MALAYAN BANKING BHD

v.

NEWAY DEVELOPMENT SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF PCA
AZHAR MA'AH JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: S-02-336-2009]
25 SEPTEMBER 2012

CONTRACT: *Agreement - Term loan agreement - Agreement in contravention of ss. 17(1) and 64(1) of Sabah Land Ordinance - Whether agreement tainted with illegality - Whether agreement void - Contracts Act 1950, ss. 2(g) & 24*

LAND LAW: *Dealings in land - Native land - Sale and purchase of native land by non-native - Native held land in trust for non-native - Whether 'dealing' within s. 4 of Sabah Land Ordinance - Whether circumvention of s. 17(1) of Ordinance - Whether transaction illegal*

LAND LAW: *Dealings in land - Native land - Term loan granted to facilitate purchase of native land by non-native - Whether transaction contravened s. 17(1) of Sabah Land Ordinance - Whether loan agreement illegal and prohibited under Ordinance*

This was an appeal by the appellant/plaintiff against the decision of the learned judicial commissioner dismissing its claim against the respondents/defendants. The fourth defendant intended to carry out a project on the lands held under native titles located in the district of Penampang. Being a non-native who was prohibited by law from "dealing" with the lands and prohibited from acquiring any interest in the lands by virtue of s. 17(1) and 64(1) of the Sabah Land Ordinance ('Ordinance'), the fourth defendant sought the assistance of a native, one Chin Nyuk Fong ('Chin') to hold the lands in trust, for and on its behalf. Pursuant to the arrangement, Chin entered into four separate sale and purchase agreements with the land owners and several trust deeds were prepared and executed in respect of the lands in favour of the first defendant and the fourth defendant. Subsequently, the fourth defendant obtained a term loan facility from the plaintiff with the expressed purpose to "part finance the purchase of a piece of land held under NT213013480, District of Penampang, Sabah". The

A fourth defendant was also offered bridging loan facility to part finance the infrastructure cost for the proposed commercial development on the land. The development project, however, was frustrated causing the plaintiff to revoke the bridging loan. The fourth defendant again used its nominee, Chin, to sell all the lands B and settled the debts with the plaintiff. However, there was still a balance of RM1,715,956.32 owing to the plaintiff. The defendants resisted the claim stating that the term loan facility granted to the fourth defendant was given specifically to "part finance the purchase of a piece of land held under NT213013480, District of C Penampang, Sabah", which was a native land and was in clear contravention of s. 17(1) of the Ordinance.

Held (dismissing appeal with costs)
Per Raus Sharif PCA delivering the judgment of the court:

D **(1)** The wordings of s. 17(1) of the Ordinance impose a bar on any dealings involving a non-native on one part and a native on the other. The object or purpose of the term loan was in such a nature that if permitted would defeat the provisions of ss. 17(1) and 64(1) of the Ordinance. It was patently clear E that the term loan agreement between the plaintiff and the fourth defendant to facilitate the purchase of the native land was made in contravention of s. 17(1) of the Ordinance. As a result, the agreement was tainted with illegality and was F forbidden in law and thus the agreement was unenforceable. (para 24)

(2) The agreement also became void within the meaning of ss. 24 and 2(g) of the Contracts Act 1950. As the transaction was tainted with illegality, all the other connected instruments such G as the deed of assignments and letters of guarantee executed pursuant to the agreement were also tainted with illegality. (para 24)

(3) The creation of the trust deed did not legitimise the H transaction as a whole (*Borneo Housing Mortgage Finance Bhd v. Bank Bumiputra Malaysia*; dist). (para 25)

(4) Through the instrument of a trust deed, Chin purported to hold the native land in trust for the fourth defendant to enable I the fourth defendant to purchase the native land through non-native. This constituted 'dealing' within the definition of s. 4 of the Ordinance. Section 17(1) of the Ordinance prohibits any kind of dealings which includes any trust deed created to

circumvent the Ordinance. The use of nominees to circumvent the prohibition of dealings in the native lands between a non-native and a native was illegal and contravened ss. 17(1) and 64(1) of the Ordinance. (paras 26 & 27)

(5) The courts would not enforce or grant any remedy under any illegal contract. However, there was an exception *ie*, when an innocent party is unaware of the illegality. On the facts, the term loan was illegal and s. 66 of the Contracts Act 1950 was of no assistance to the plaintiff. The plaintiff being an established financial institution should have investigated the legal status of the native land before entering into the term loan agreement with the fourth defendant. Hence, the plaintiff's contention that it was an innocent party who was unaware of the illegality was unacceptable. (para 30)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh perayu/plaintiff terhadap keputusan yang arif Pesuruhjaya Kehakiman menolak tuntutannya terhadap responden-responden/defendan-defendan. Defendan keempat bercadang untuk memulakan sebuah projek di atas tanah yang dipegang di bawah hak milik anak negeri terletak di daerah Penampang. Sebagai seorang yang bukan anak negeri yang dilarang di bawah undang-undang daripada "berurusan" dengan tanah tersebut dan dihalang daripada memperoleh apa-apa kepentingan di dalam tanah tersebut di bawah s. 17(1) dan 64(1) Ordinan Tanah Sabah ('Ordinan'), defendan keempat mendapatkan bantuan seorang anak negeri yang bernama Chin Nyuk Fong ('Chin') untuk memegang tanah tersebut sebagai amanah, untuknya dan bagi pihaknya. Berikutan aturan tersebut, Chin memasuki empat perjanjian jual beli yang berasingan dengan pemilik-pemilik tanah tersebut dan beberapa surat ikatan amanah disediakan dan dimeterai berhubungan dengan tanah-tanah tersebut memihak kepada defendan pertama dan defendan keempat. Kemudian defendan keempat memperoleh kemudahan pinjaman berjangka daripada plaintif dengan tujuan jelas untuk "membiaya sebahagian pembelian tanah yang dipegang di bawah NT213013480, Daerah Penampang, Sabah". Defendan keempat juga ditawarkan kemudahan pinjaman penyambung untuk membiaya sebahagian kos infrastruktur bagi pembangunan komersial yang dicadangkan di atas tanah tersebut. Walau bagaimanapun, projek pembangunan tersebut gagal, menyebabkan plaintif membatalkan pinjaman penyambung. Defendan keempat sekali lagi menggunakan

penamanya, Chin, untuk menjual kesemua tanah dan menyelesaikan hutangnya dengan plaintif. Walau bagaimanapun, terdapat baki sebanyak RM1,715,956.32 masih terhutang kepada plaintif. Defendan-defendan membantah tuntutan tersebut dengan menyatakan bahawa kemudahan pinjaman berjangka yang diberikan kepada defendan keempat diberikan secara khusus untuk "membiaya sebahagian pembelian tanah yang dipegang di bawah NT213013480, Daerah Penampang, Sabah", yang merupakan tanah anak negeri dan jelas bertentangan dengan s. 17(1) Ordinan.

Diputuskan (menolak rayuan dengan kos)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Seksyen 17(1) mengenakan halangan bagi apa-apa urusan yang berkait dengan seseorang yang bukan anak negeri di satu pihak dan anak negeri di satu lagi pihak. Objek atau tujuan pinjaman berjangka adalah bersifat bahawa jika dibenarkan ia akan menggagalkan peruntukan ss. 17(1) dan 64(1) Ordinan. Adalah amat jelas bahawa perjanjian pinjaman berjangka tersebut di antara plaintif dan defendan keempat untuk memudahkan pembelian tanah anak negeri dibuat bertentangan dengan s. 17(1) Ordinan. Dengan itu, perjanjian tersebut adalah tidak sah dan dilarang di bawah undang-undang dan dengan itu tidak boleh dilaksanakan.

(2) Perjanjian tersebut juga menjadi batal dalam maksud ss. 24 dan 2(g) Akta Kontrak 1950. Oleh sebab transaksi tersebut adalah tercemar oleh ketaksahan, kesemua instrumen yang berkaitan seperti surat peletakhakkan dan surat-surat jaminan yang dimeterai berikutan perjanjian tersebut juga adalah juga dicemari oleh ketaksahan.

(3) Pembuatan surat ikatan amanah tidak boleh menjadikan transaksi tersebut sah secara keseluruhannya (*Borneo Housing Mortgage Finance Bhd v. Bank Bumiputra Malaysia*; dibezakan).

(4) Melalui instrumen surat ikatan amanah, Chin bertujuan untuk memegang tanah anak negeri dalam amanah bagi defendan keempat untuk membolehkan defendan keempat membeli tanah anak negeri melalui seorang yang bukan anak negeri. Ini membentuk 'urusan' dalam definasi s. 4 Ordinan. Seksyen 17(1) Ordinan melarang apa-apa bentuk urusan yang termasuk surat ikatan amanah yang dibuat untuk memintasi Ordinan. Penggunaan penama untuk memintasi larangan urusan tanah

anak negeri di antara seorang yang bukan anak negeri dengan anak negeri adalah tidak sah dan bertentangan dengan ss. 17(1) dan 64(1) Ordinan.

(5) Mahkamah tidak akan melaksanakan atau memberikan remedi di bawah apa-apa kontrak yang tidak sah. Walau bagaimanapun terdapat pengecualian iaitu apabila pihak yang tidak bersalah tidak mengetahui tentang ketaksahan tersebut. Di atas fakta, pinjaman berjangka tersebut adalah taksah dan s. 66 Akta Kontrak tidak membantu plaintif. Plaintif sebagai institusi kewangan yang sudah mapan sepatutnya menyiasat status undang-undang tanah anak negeri tersebut sebelum memasuki perjanjian pinjaman berjangka tersebut dengan defendan keempat. Dengan itu, hujahan plaintif bahawa ia adalah pihak yang tidak bersalah yang tidak mengetahui tentang ketaksahan tersebut tidak boleh diterima.

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Bank Bumiputra (M) Bhd & Anor [1991] 2 CLJ 1497; [1991] 2 CLJ (Rep) 359 HC ***(dist)***

Central Securities (Holdings) Bhd v. Haron Mohamed Zaid [1979] 1 LNS 9 FC ***(refd)***

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***

Menaka v. Lum Kum Chum [1976] 1 LNS 71 PC ***(refd)***

OCBC Bank (Malaysia) Bhd v. Master Arc Sdn Bhd & 8 Others (Unreported) (Civil Suit No K 22-173-2000) ***(foll)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***

Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96 FC ***(refd)***

Spector v. Agenda [1971] 3 All ER 417 ***(refd)***

St John Shipping Corp v. Joseph Rank Ltd [1957] 1 QB 267 ***(refd)***

Tan Bing Hock v. Abu Samah [1968] 1 LNS 150 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 2(g), 24(a), (b), 66,
Sabah Land Ordinance, ss. 4, 17(1), 64(1),

For the appellant - Ronny Cham (Brenndon Soh with him); M/s Ronny Cham & Co

For the respondent - Baldev Singh; M/s Baldev Gan & Assocs

[Appeal from High Court, Kota Kinabalu; Suit No K22-61-2002]

Reported by S Barathi

A

JUDGMENT

Raus Sharif PCA:

Introduction

B **[1]** This is an appeal by the appellant against the decision of the learned Judicial Commissioner ("JC") on 30 December 2008, in dismissing the appellant's claim against the respondents with costs.

[2] The appellant is the plaintiff and the respondents are the C defendants. For convenience, parties will be referred to as plaintiff and defendants as in the court below.

Background Facts

[3] The relevant antecedent facts giving rise to this appeal are D these. Sometime in 1996, the 4th defendant, a property development company, wanted to carry out a project known as "Mixed Use Development Project" ("the project") on lands held under native titles NT213109490, NT213164928, NT213139630, and NT213013480 ("said lands") located in the District of E Penampang at Donggongon Township, Sabah. Since the said lands were classified as native land, the 4th defendant, a non-native was prohibited by law from "dealing" with the said lands and was prohibited from acquiring any interest in the said lands by virtue of ss. 17(1) and 64(1) of the Sabah Land Ordinance F ("Ordinance"). Hence, in order to purchase the said lands the 4th defendant sought the good help of a native nominee known as Chin Nyuk Fong ("Chin") to hold the said lands in trust, for and on its behalf.

G **[4]** Pursuant to this arrangement, Chin entered into four separate sale and purchase agreements with the land owners for the total value of RM5.2 million. Subsequent thereto several trust deeds were prepared and executed in respect of the said lands in favor of the 1st defendant, a company incorporated in Malaysia H and the 4th defendant. The particulars of the trust deeds can be summarily set forth as follows:

(a) in respect of title NT213139630, Chin executed a trust deed dated 6 June 1997 in favor of the 1st defendant;

I (b) in respect of title No NT213164928, Chin executed a trust deed dated 19 May 1997 in favor of the 1st defendant;

(c) in respect of title No NT213109490, Chin executed a trust deed dated 1 April 1997 in favor of the 1st defendant; and A

(d) in respect of title No NT213013480, Chin executed a trust deed dated 30 October 1996 in favor of the 4th defendant.

[5] Pertinent to note that the particular trust deed for title No NT213013480 (native land) which forms the subject matter of the dispute in this appeal was executed in favor of the 4th defendant alone. By virtue of this trust deed the 4th defendant became the beneficial owner of the native land. On 8 September 1997 Chin executed a power of attorney which was eventually revoked and replaced by another power of attorney dated 8 July 2002 which gave absolute power to the 4th defendant to sell, dispose, charge or in any way deal with the native land. In order to part finance the purchase and develop the said land the 4th defendant sought banking facilities from Maybank Finance Berhad (as it then was). B C D

[6] Accordingly, a term loan facility agreement was executed between Maybank Finance Berhad and the 4th defendant on 30 January 1997 amounting to RM2.8 million. The purpose of the loan was: to part finance the purchase of a piece of land held under NT213013480, District of Penampang, Sabah. A Memorandum of Charge dated 30 January 1997 was executed by Chin in favour of Maybank Finance for 2.8 million which was secured by a 1st legal 3rd party charge over the native land. E F

[7] By its letter of offer dated 31 January 1997 Maybank Finance Berhad offered the 4th defendant a bridging loan facility for RM3.5 million to part finance the infrastructure cost for the proposed commercial development on the said land. The 4th defendant accepted the bridging loan facility. However on 31 March 1997, the 4th defendant entered into a deed of assignment with the 1st defendant, assigning absolutely all its benefits, rights, interest in the said land to the 1st defendant. By another deed of assignment dated 8 September 1997 the term loan facility of RM2.8 million dated 30 January 1997 was absolutely assigned to the 1st defendant by the 4th defendant. This was done with the consent and knowledge of Maybank Finance Berhad. The 2nd defendant and the 3rd defendant being the directors of the 1st defendant and the 4th defendant executed two letters of guarantee dated 30 January 1997 and 8 July 1997 in favor of Maybank Finance as security for the term loan facility of RM2.8 million and bridging loan facility of RM3.5 million. The G H I

4th defendant in turn issued a corporate guarantee in favor of Maybank Finance Berhad as a consideration for the term loan and bridging loan facility given to the 1st defendant. In addition to this Malayan Banking Berhad also granted to the 1st defendant an additional term loan facility of RM2.2 million and a bridging loan facility of RM6.0 million by its letter of offer dated 11 July 1997.

[8] Unfortunately, the development project was frustrated sometime in October 1998. Malayan Banking Berhad revoked the RM6.0 million Bridging Loan dated 11 July 1997 allegedly on the ground that the 1st defendant failed to submit its application for drawdown within the availability period. Since the project was stalled, the 1st defendant had no alternative but to surrender the project to an interested party to minimise losses. Given the circumstances, the 4th defendant used its nominee Madam Chin to sell all the said lands in order to repay both the Malayan Banking Berhad and Maybank Finance Berhad. The proceeds of sale amounting to RM5.2 million were used to settle in full the 1st defendant's entire debts owing to the Malayan Banking Berhad. The 1st defendant managed to settle the bridging loan facility of RM3.5 million owing to Maybank Finance Berhad in full. The term loan facility of RM2.8 for the said land was however only settled in part. There was a balance of RM1,715,956.32 still owing to the Maybank Finance Berhad.

[9] By virtue of a vesting order dated 17 August 2004 granted by the High Court of Malaya at Kuala Lumpur, all rights, powers and interest including all legal proceedings of Maybank Finance Berhad was vested under Malayan Banking Berhad (plaintiff). The term loan facility account of the 1st defendant now came within the purview of the Malayan Banking Berhad.

[10] Malayan Banking Berhad as the plaintiff instituted an action against the 1st defendants claiming for the balance sum of the term loan facility. The defendants resisted the claim stating that the term loan of RM2.8 million granted by Maybank Finance Berhad (as it then was) to the 4th defendant originally and later assigned to the 1st defendant was given specifically to "part finance the purchase of a piece of land held under title No NT 213013480, District of Penampang Sabah" which was a native land. This, according to the defendant, was is in clear contravention of s. 17(1) of the Ordinance. The learned JC after full trial dismissed the plaintiff's claim with costs.

Findings Of The High Court

[11] The learned JC in dismissing the plaintiff's claim held *inter alia*:

(a) that the purchase of NT 213013480 by the 4th defendant is forbidden by law, unlawful and unenforceable as it contravenes s. 17(1) of the Ordinance. The salient provision of s. 17(1) of the Ordinance clearly prohibits any dealing made by the native on one part and a non native on the other part. Since the whole transaction was tainted with illegality; hence, the whole agreement is a void agreement by virtue of ss. 24(a) and (b) of the Contracts Act 1950. Consequently, all the other instruments connected with the agreement such as the deed of assignments and the letters of guarantee is also tainted with illegality. (*Spector v. Agenda* [1971] 3 All ER 417);

(b) that the term loan facility of RM2.8 million which facilitated the purchase is also void for illegality. (*Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; *St John Shipping Corp v. Joseph Rank Ltd* [1957] 1 QB 267 and *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57);

(c) that Chin had no beneficial interest in the said Native Land. She conspired with the 4th defendant to be used as an instrument to regularise an otherwise illegal transaction;

(d) that the plaintiff and the 4th defendant were in *pari delicto* in facilitating the illegal act by the plaintiff to deal with the Native Land and to acquire interest over the Native Land;

(e) that the trust deed created with the object of defeating the law is not a valid trust deed. The case of *Borneo Housing Mortgage Finance v. Bank Bumiputra (M) Bhd* [1991] 2 CLJ 1497; [1991] 2 CLJ (Rep) 359 relied on by the plaintiff must be confined to its own peculiar facts and circumstances; and

(f) that s. 66 of the Contracts Act 1950 will not aid the plaintiff as the plaintiff knew of the illegality from the outset. The plaintiff being an established financial institution whose business was to give out loans to the public should have at least investigated the legal status of the lands before entering into the term loan agreement with the 4th defendant.

A **Submissions**

[12] In short, the thrust of the plaintiff's argument was that the parties privy to the loan transaction did not contravene s. 17(1) of the Ordinance as there was no registration of the native titles
B concerned in the name of the company, be it the 1st or the 4th defendant.

[13] The plaintiff's counsel argued that the purpose and creation of the purported trust deed to facilitate the term loan facility does not amount to "dealing" as defined under s. 4 of the Ordinance.
C Learned counsel reiterated further that the creation of a trust deed in this instant case falls outside the ambit of a "dealing" as defined under s. 4 of the Ordinance. Thus, the parties privy to the whole transaction are not in breach of s. 17(1) of the Ordinance as a creation of a trust deed was not to be considered as a "dealing"
D within the meaning of s. 17(1) of the Ordinance. In support thereof learned counsel referred us to the case of *Borneo Housing Mortgage Finance Bhd v. Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 261.

E **[14]** Learned counsel for the plaintiff further submitted that the plaintiff was unaware of any illegality. In this regard, he submitted that the learned JC erroneously found that the plaintiff knew or should have known that the contract entered into with the 1st defendant was illegal when there was no evidence led to suggest
F that the plaintiff was aware of any illegality. Alternatively, he submitted that even assuming that the whole transaction was illegal (which the plaintiff is vehemently denying), s. 66 of the Contracts Act 1950 can be invoked by this court to assist the plaintiff. In support thereof the he referred us to the case of
G *Menaka v. Lum Kum Chum* [1976] 1 LNS 71.

[15] Learned counsel for the defendants in their rebuttal argument conversely submitted that the plaintiff's contentions that the term loan agreement did not contravene s. 17(1) of Ordinance is
H misconceived in fact and in law as the Ordinance expressly prohibits the 4th defendant (being a non-native) from "dealing" with the native land. Learned counsel further submitted that, s. 64(1) of the Ordinance also expressly prohibits a non native from acquiring any interest in native lands. In support thereof he
I referred us to the case of *OCBC Bank (Malaysia) Bhd v. Master Arc Sdn Bhd & 8 Others* (Unreported) (Civil Suit No K 22-173-2000).

[16] Learned counsel strenuously argued before us that since the term loan was made in clear contravention of s. 17(1) and s. 64(1) of the Ordinance; it is therefore illegal, unenforceable and void. Consequently, the personal guarantees of the 2nd and 3rd defendants and the Corporate Guarantee of the 4th defendant are all tainted with illegality, unenforceable and is a void instrument by virtue of ss. 24 and 2(g) of the Contracts Act 1950. In support thereof he referred us to the case of *Spector v. Ageda* [1971] 3 All ER 417 at p. 426.

[17] Learned counsel demonstrated to us that the sole and only purpose for which the said term loan was granted to the defendants were to enable a non-native to "deal" with the said native land and to acquire the beneficial interest therein. The "object" or purpose of the said term loan was of such a nature, that if permitted, would defeat the provision of s. 17(1) and s. 64(1) of the Ordinance.

[18] In a similar breath, learned counsel maintained that a contract to do an act illegal, prohibited or forbidden by statute is unenforceable and illegal. The court will not enforce a contract which is expressly or impliedly prohibited by statute. In reference thereof he referred us to the cases of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 (Federal Court) and *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] CLJ (Rep) 57 (Supreme Court).

[19] Learned counsel then drew our attention to the fact that both the plaintiff and the 4th defendant were in *pari-delicto* in entering into the said term loan agreement which had its sole purpose to enable a non native to acquire an interest in the said land. In the circumstance, he submitted that the plaintiff cannot seek the assistance of the court to recover any balance of monies allegedly due to them. He referred us to the cases of *Tan Bing Hock v. Abu Samah* [1968] 1 LNS 150,; *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96.

Findings

[20] Upon considering the submissions of the parties in canvassing this appeal before us, the salient issues may be postulated as follows:

A (i) whether the agreement entered by the plaintiff and the 4th defendant for the term loan of RM2.8 million to facilitate the purchase of the native land by the 4th defendant using a native nominee contravenes s. 17(1) of the Ordinance;

B (ii) whether the trust deed executed by Chin, the native nominee of the 4th defendant amounted to a "dealing" within the definition of s. 4 of the Ordinance; and

(iii) whether if both the above issues are decided in the affirmative, the 1st 2nd, 3rd and 4th defendants are bound to refund the C monies owing to the plaintiff by virtue of s. 66 of the Contracts Act 1950.

[21] In determining the first and second issues it may be useful to reproduce the relevant statutory provisions of the Ordinance D pertaining to dealings in regards to native lands. Section 17(1) of the Ordinance reads as follows:

> 17(1) Except with the written permission of the Minister all dealings in land between non-natives on the one hand and natives on the other hand are hereby expressly E forbidden and no such dealings shall be valid or shall be recognized in any court of law unless they shall have been entered into and concluded before the 16th day of January, 1883, or in the terms of the next following clause.

F Section 64(1) of the Ordinance amplifies the above mentioned provision and it reads as follows:

> 64(1) This Part shall apply only to lands held by natives, and no non-native may purchase any land held under this G Part, unless in accordance with the terms of s. 17, or acquire any interest therein by way of charge or otherwise.

[22] The definition of what constitutes "dealing" as circumscribed H in s. 17(1) of the Ordinance can be found in s. 4 of the Ordinance which reads:

> "dealing" means any transaction of whatever nature by which land is affected under this Ordinance.

I **[23]** At the heart of this dispute lies the true interpretation to be placed on ss. 17(1) and 64(1) of the Ordinance. The learned JC, applying the above provisions of the Ordinance made the following findings:

> On the surface there is nothing irregular about the transaction involving NT213013480. It is dealing between two willing natives. But the simple truth beneath the surface is the Chin Nyuk Fong was used by the 4th defendant to purchase NT 213013480. She had no beneficial interest whatsoever in the land. She did not even spend a single cent to purchase the land. The land was meant for the 4th defendant's project. She was merely an instrument to regularize an otherwise illegal transaction.

[24] We are inclined to agree with the above findings. We are of the view that the wordings of s. 17(1) of the Ordinance impose a bar on any dealings involving a non native on one part and a native on the other. The object or purpose of the term loan was such a nature that if permitted it would defeat the provisions of ss. 17(1) and 64(1) of the Ordinance. Under that scheme of provision it is patently clear to us that the term loan agreement made between the plaintiff and the 4th defendant to facilitate the purchase of the native land was made in contravention of s. 17(1) of the Ordinance. As a result, the agreement is tainted with illegality and forbidden by law. In totality, the agreement becomes unlawful and unenforceable (see *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; *St John Shipping Cory Joseph Rank Ltd* [1957] 1 QB 267 and *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] CLJ (Rep) 57). Quite apart from this, the whole agreement also becomes a void agreement within the meaning of s. 24 and s. 2(g) of the Contracts Act 1950. Since the whole transaction is tainted with illegality, consequently all the other connected instruments such as the deed of assignments, letters of guarantee executed pursuant to the agreement are also tainted with illegality. (See *Spencer v. Agenda* [1971] 3 All ER 417)

[25] As for the second issue, we are of the view that the creation of the trust deed did not legitimise the transaction as a whole. With respect, the heavy reliance on the case of *Borneo Housing Mortgage Finance Bhd v. Bank Bumiputra (M) Bhd & Anor* [1991] 2 CLJ 1497; [1991] 2 CLJ (Rep) 359 is of no assistance to the plaintiff. We are of the view that the decision in *Borneo Housing Mortgage*'s case is confined to its own peculiar facts and circumstances. The issue that forms the core of the present appeal is distinguishable from the *Borneo Housing Mortgage*'s case

[26] In this present appeal before us, it is evident that through the instrument of trust deed Chin purported to hold the native land in trust for the 4th defendant to enable the 4th defendant

A to purchase the native land through a non native. To us, this constitutes "dealing" within the definition of s. 4 of the Ordinance. As such, we cannot accede to the plaintiff's arguments as this will mean that creation of a trust deed to circumvent the provisions of s. 17(1) of the Ordinance is valid. This cannot be the intention
B of the legislators. Clearly, s. 17(1) of the Ordinance prohibits any kind of dealings and this will include any trust deed created to circumvent the Ordinance. In this regard, we would like to refer to the case of *OCBC Bank (Malaysia) Bhd v. Master Arc Sdn Bhd & 8 others* (Unreported) (Civil Suit No: K22-173-2000), wherein
C Justice Ian Chin J remarked the following:

> "The Land Ordinance has a wider encompass in its definition where it defined the term in the following words" ... any transaction of whatever nature by which land is affected under this ordinance ...". Clearly then an attempt by a trust deed would be
D one of the nature of dealing which s. 17 of the Sabah Land Ordinance seeks to strike down

[27] We accept the forgoing passage by the learned judge as a correct statement of law. In the premises, we affirm the
E proposition that the use of nominees (be it in the name of a trust) to circumvent the prohibition of dealings in the native lands between a non-native and a native is illegal and contravenes s. 17(1) and s. 64(1) of the Ordinance.

F **[28]** Having said the above, we will now move on to the third issue. It is a question of whether s. 66 of the Contracts Act 1950 is of any assistance to the plaintiff. Section 66 of the Contracts Act 1950 provides that:

> When an agreement is discovered to be void, or when a contract
G becomes void, any person who had received any advantage under the agreement or contract is bound to restore it, or make compensation for it, to the person from whom he received it.

[29] It is trite that the courts will not enforce nor grant any
H remedy under any illegal contract. However there are exceptions and one of which is when an innocent party is unaware of the illegality. (see *Central Securities (Holdings) Bhd v. Haron Mohamed Zaid* [1979] 1 LNS 9 and *Menaka v. Lum Kum Chum* [1976] 1 LNS 71).

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[30] On the facts and circumstances of this case, we are unable to accept the plaintiff's contention that it was an innocent party who was unaware of the illegality. No doubt there was no direct evidence led to show that the plaintiff was aware of the illegality, but as rightly pointed out by the learned JC that the plaintiff being an established financial institution should have investigated the legal status of the native land before entering into the term loan agreement with the 4th defendant. Thus, we are in agreement with the learned JC, that the term loan was illegal and s. 66 of the Contracts Act 1950 is of no assistance to the plaintiff. In this context it may be useful to refer to the case of *Tan Bing Hock v. Abu Samah* [1968] 1 LNS 150 and *Singma Sawmill Co Sdn Bhd v. Asina Holdings (Industrilised Buildings) Sdn Bhd* [1979] 1 LNS 96 relied upon by the defendants' counsel.

[31] In conclusion, we would like to reiterate here, as we have alluded in the earlier part of this judgment that the salient provisions of s. 17(1) of the Ordinance does not recognise any kind of dealings in the native lands in favor of a non native; save, and except by way of a charge in favor of a financial institution, which is permitted under s. 17(4) of the Ordinance. We are minded of the fact that in determining issues pertaining to native rights under s. 17(1) of the Ordinance it is incumbent upon the court to accord its provision a strict construction. We are of the considered view that any other construction especially one that places a meaning otherwise than what was subscribed may result in judicial disobedience to the will of the parliament.

[32] In the circumstances, we are unanimous in our decision that this appeal must fail. We therefore dismiss this appeal with costs.